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ALEXANDER L. STEVAS,
CLERK

NO. 84-1787

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

JOSEPH ALTON BOWERS

Petitioner

versus

THE CONTINENTAL INSURANCE COMPANY

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

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APPENDIX "D"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C82-1820

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

ORDER

Plaintiff brought this action against his automobile insurer in the State Court of DeKalb County and Defendant removed it to this Court, citing the Court's diversity jurisdiction. The case is before the Court on Plaintiff's Motion to Dismiss Petition for Removal.

Plaintiff argues that this case falls into the "direct action" provisio

(sic) of the diversity jurisdiction statute, 28 U.S.C. §1332(c), and therefore the Court has no jurisdiction. The Court rejected this argument in Morgan v. State Farm Insurance Companies, No. C81-2443 (N.D. Ga., February 11, 1982). For the reasons stated in Morgan, the Court DENIES Plaintiff's Motion to Dismiss Petition for Removal. The Clerk is DIRECTED to attach a copy of the Morgan opinion to this Order.

SO ORDERED, this 24 day of September, 1982.

Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C81-2443

RENEE B. MORGAN and RENATE HERBRAND, Individually and on behalf of all those persons within the State of Georgia similarly situated

vs.

STATE FARM INSURANCE COMPANIES

ORDER

This action is a dispute regarding insurance coverage. It is before the Court on Plaintiffs' Motion to Remand and on Defendant State Farm's Motion for a Protective Order.

Plaintiffs brought this action in the Superior Court of DeKalb County, Georgia. State Farm removed the action

to this Court, pursuant to 28 U.S.C. §1441(a), which grants State Farm the right to do so if the case could have been brought in this Court; State Farm alleges diversity of citizenship under 28 U.S.C. §1332. Although Plaintiffs purport to represent a class for diversity jurisdiction purposes, it is the citizenship of the named Plaintiffs that governs. See Snyder v. Harris, 394 U.S. 332, 340 (1969); Calagaz v. Calhoun, 309 F.2d 248, 253 (5th Cir. 1962). The named Plaintiffs are citizens of Georgia, while State Farm is an Illinois corporation with its principal place of business in Illinois. Plaintiffs do not dispute the fact that $10,000 is at issue, and ordinarily, therefore, there would be no

question that this action could have been brought in this Court under 28 U.S.C. §1332.

Plaintiffs contend that this is not an ordinary case, however, but falls within the exception to diversity jurisdiction provided by 28 U.S.C. §1332(c). That subsection provides, in relevant part:

> Provided further that in any direct action against the insurer of a policy or contract of liability insurance...to which action the insured is not joined as a party defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as the State by which the insurer has been incorporated and of the State where it has its principal place of business.

Plaintiffs contend that this is a direct action against an insurer to which the insured has not been joined as a defendant. As a result, according to Plaintiffs, State Farm is deemed to be a citizen of Georgia because its insureds, Plaintiffs themselves, are citizens of Georgia. Therefore, there is no diversity of citizenship.

Plaintiffs' reading of 28 U.S.C. §1332(c) puts the Court in an anomalous position of comparing the citizenship of Plaintiffs with the citizenship of Plaintiffs to test for diversity. The Court need not do this, however, because the legislative history of 28 U.S.C. §1332(c) makes it clear that the subsection was not intended to apply to

lawsuits brought by an insured against his own insurer.

> The purpose of the proposed legislation is to...eliminate under the diversity jurisdiction...suits on certain tort claims in which both parties are local residents, but which, under a State "direct action" statute, may be brought directly against a foreign insurance carrier without joining the local tortfeasor as a defendant.

S. Rep. No. 1308, 88th Cong., 2d. Sess. reprinted in [1964] U.S. Code Cong. & Ad. News 2778, 2778-79 (emphasis added). The legislation was intended only to apply to suits under "direct action" statutes, which permit an injured party to bring suit directly against the insurer of a tortfeasor. See id. at 2779. In essence, Congress intended to prevent

tort plaintiffs from entering the federal courthouse by the back door, by bringing suit directly against the insurer of the nondiverse tortfeasor. Several courts have held that a suit by an insured against his own insurance company is not a "direct action" within the meaning of the subsection 1332(c). E.g., White v. United States Fidelity and Guaranty Co., 356 F.2d 746, 747-48 (1st Cir. 1966); Fidelity and Deposit Co. v. Southern Utilities, Inc., 524 F. Supp. 692, 693 (M.D. Ga. 1981); O'Hanlon v. Hartford Accident and Indemnity Co., 439 F. Supp. 377, 380 (D. Del. 1977). This Court agrees with the reasoning of those opinions.

State Farm requests a protective order regarding three interrogatories served by Plaintiffs along with their Complaint. The interrogatories seek information regarding claims against State Farm by members of the purported plaintiff class. State Farm asserts that the requests are oppressive and unduly burdensome. Such information will be relevant only if the Court certifies a plaintiff class, and the Court will not require State Farm to produce it until that time.

Plaintiffs' Motion to Remand is DENIED. State Farm's Motion for a Protective Order is GRANTED.

Because this action was brought in state court, the Complaint does not

conform to Local Rule 220, which specifies the requirements for a class action complaint. The Court DIRECTS Plaintiffs to amend their Complaint within 20 days to comply with the requirements of Local Rule 220. Pursuant to the spirit of Local Rule 221.13, the time in which Plaintiffs must move to certify their class is EXTENDED until 90 days from the date of entry of this Order.

SO ORDERED, this 11 day of February, 1982.

Orinda D. Evans

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX "E"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C82-1820

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

ORDER

This action is before the Court on the Plaintiff's Motion for Interlocutory Appeal.

On July 27, 1982, the Plaintiff filed a Complaint in the State Court of DeKalb County, Georgia, claiming that he was a named insured under a no-fault insurance policy issued by the Continental Insurance Company. The Plaintiff also claimed that he had been

denied the opportunity to accept the maximum optional personal protection coverage as required by Georgia Code Annotated §56-3403(b). The Plaintiff sought to accept the continuing offer created in Jones v. State Farm Mutual Automobile Insurance Co., 156 Ga. App. 230, 274 S.E.2d 623 (1980), cert. dismissed as improvidently granted, 248 Ga. 46, 280 S.E.2d 837 (1981), overruled, Atlanta Casualty Co. v. Flewellen and Van Dyke v. Allstate Insurance Co., Nos. 64501 & 64511, slip. ops. (Ga. Ct. App. Dec. 1, 1982). The Plaintiff requested damages, a statutory penalty and attorney's fees.

On August 24, 1982, the Defendant filed a petition to remove the action to

the United States District Court for the Northern District of Georgia. The Plaintiff filed a Motion to Dismiss the Petition for Removal. In an Order entered September 27, 1982, the Court denied the Plaintiff's request to dismiss the petition for removal. The Plaintiff now requests that the Court amend this Order so that the Plaintiff can appeal the interlocutory Order.

An order denying remand of a case which has been removed to federal court

is not a final order within the meaning of 28 U.S.C. §1291,[1] but is an interlocutory Order. Poirrier v. Nicklos Drilling Co., 648 F.2d 1063, 1064-65 (5th Cir. 1981).[2] It cannot be appealed unless certified by the district

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[1] Section 1291 of Title 28 states that:

> The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..., except where a direct review can be had in the Supreme Court.

[2] Decisions of the Fifth Circuit handed down prior to September 30, 1981, are binding precedent unless overruled or modified by the Eleventh Circuit en banc. Bonner v. City of Prichard, 661 F.2d 1206, 1209-10 (11th Cir. 1981).

court according to the provisions of 28 U.S.C. §1292(b). Poirrier, 648 F.2d at 1065.[3]

A party may seek the permission of the court of appeals to appeal an interlocutory order when a district judge in a civil action states that (1) the

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[3] Section 1292(b) of Title 28 provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

order involves a controlling question of law, (2) there is substantial ground for difference of opinion respecting its correctness, and (3) immediate appeal from the order may materially advance the ultimate termination of the litigation. The district court judge must find that all three elements exist.

The Plaintiff in the instant case argues that there is a "substantial ground for difference of opinion" on the question of whether the district court has diversity jurisdiction to hear the instant case.[4] In support of this

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[4] The Plaintiff argues that this case falls into the "direct action" proviso of the diversity action statute, 28 U.S.C. §1332(c), and that therefore this Court has no jurisdiction.

allegation, the Plaintiff cites McMurray (sic) v. Prudential Property and Casualty Insurance Co., 458 F. Supp. 209 (E.D. Mich., S.D. 1978) and Ford Motor Co. v. Insurance Co. of North America, 669 F.2d 421 (6th Cir. 1982). As the Defendant has pointed out in the Response to Plaintiff's Motion for Interlocutory Appeal, McMurray (sic) and Ford are not applicable to the facts of the instant case. Neither of the cited cases involves the facts of the case at bar -- an insured bring suit against his own insurance company. The Court in McMurray (sic) distinguished the facts of that case by stating that "the proviso [the "direct action" against insurer provision of 28 U.S.C. §1332(c)] should apply in

no-fault suits, at least in those instances where the named insured is not the plaintiff." McMurray (sic), 458 F. Supp. at 211. (emphasis added).

The Court concludes that the issue raised by the Plaintiff does not involve a "controlling question of law as to which there is substantial ground for difference of opinion." Therefore, the Plaintiff's Motion for Interlocutory Appeal is DENIED.

SO ORDERED, this 21 day of December, 1982.

Orinda D. Evans

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX "F"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C82-1820

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

ORDER

This Jones-related action is before the Court on the Plaintiff's Motion for Summary Judgment, Defendant's Motion for Declaratory Judgment, and Plaintiff's Request for Oral Argument on Defendant's Motion for Declaratory Judgment and on his Motion for Summary Judgment.

The Plaintiff filed a complaint, seeking to recover $42,419.16 in optional personal injury protection ("PIP") benefits, plus statutory penalties, punitive damages, attorney's fees and costs.

The Defendant filed an answer. The Defendant also filed a counterclaim and request for declaratory judgment that the Plaintiff is not entitled to optional PIP coverage under the two policies issued by Continental Insurance Company to Plaintiff.

On January 11, 1983, the Court stayed proceedings in this suit pending a final decision of the Supreme Court of Georgia in Flewellen v. Atlanta Casualty Company and Van Dyke v. Allstate

Insurance Company. The Court lifted the stay on March 28, 1983, directing both parties to file briefs on any relevant issues. Both parties complied with the Order.

The parties in this suit agree that the two Continental Insurance Company application forms signed by the Plaintiff do not comply with the requirements set forth in Flewellen and Van Dyke. The dispute concerns whether the Plaintiff is entitled to recover optional PIP benefits from the Defendant.

According to the Defendant, the relevant facts are as follows: The Plaintiff applied to the Defendant on February 26, 1976 for a policy of automobile liability insurance.

Following the Plaintiff's application, Continental issued a policy with basic PIP coverage. On July 17, 1979, the Plaintiff applied for a second no-fault insurance policy with basic PIP coverage. The first policy remained in force. On August 24, 1981, the Plaintiff was injured while operating a truck owned by J.A. Bowers Building, Inc. and insured under a policy of commercial automobile insurance issued by the Aetna Insurance Company. As a result of the accident, the Plaintiff received $43,750 in optional PIP benefits under the Aetna policy. On April 26, 1982, the Plaintiff sent a letter to the Defendant, demanding

that Continental pay him $50,000 in PIP benefits.[1] In contrast to the Defendant's statement of the facts, the Plaintiff states that he "has received a total of $43,750 by virtue of a compromise settlement with Aetna Insurance Company for a previous excess no-fault claim which extinguishes the first $50,000.00 of medical benefits due Plaintiff in this case." Plaintiff's Brief in Support of Motion for Summary Judgment at 2. (emphasis added).

As stated above, the issue is whether the Plaintiff may recover additional PIP benefits as a result of

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[1] The Plaintiff demanded $92,419.16 in PIP benefits, until the $50,000 statutory limit of one of the Continental insurance policies was exhausted.

the August 24, 1981 accident above that amount received from Aetna.

First, the Court finds that Mr. Bowers received $43,750 in PIP benefits from Aetna as a result of the August 24, 1981 accident, not as a result of a previous claim. See Plaintiff's Response to Defendant's First Interrogatories and Request for Production of Documents ¶4(c); Exhibit A attached to Defendant's Motion for Declaratory Relief.

Second, the Court concludes that the Plaintiff is not entitled to $50,000 in PIP benefits from Continental Insurance

Company. The Georgia courts and legislature[2] have made it clear that under the circumstances of the instant case, the Plaintiff may not "stack" PIP benefits even if there is no duplication of these benefits. When the Georgia Court of Appeals, in Georgia Casualty & Surety Company v. Waters, et al., 146 Ga. App. 149, 246 S.E.2d 202 (1978), had an opportunity to address the "stacking"

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[2] OCGA §33-34-4(c), formerly Ga. Code Ann. §56-3403b (editoral changes only), provides:

> The total benefits required to be paid under this Code section without regard to fault as the result of any one accident shall not exceed the sum of $5,000.00 per each individual covered as an insured person or such greater amount of coverage as has been purchased on an optional basis as provided in Code Section 33-34-5, regardless of the number of insurers providing such benefits or of the number of policies providing such coverage.

issue, the court concluded: "We find that there is no basis for stacking under the [Georgia Motor Vehicle Accident Reparations Act]." Id. at 151. Although the issue in Waters was whether a party can stack basic PIP benefits, the court gave several examples of the "stacking" problem, one of which is relevant to the instant case:

> Situation 5. A, covered by basic PIP and $45,000 additional PIP, is struck by B with basic PIP plus $20,000 additional PIP. A is covered by B's basic PIP and B's additional PIP up to the limit of that policy. As to amounts in excess of that sum, A's additional PIP then covers up to the limit of A's policy (in this example, the last $25,000 up to an aggregate of $50,000).

See also Georgia Farm Bureau Mutual Insurance Company v. Musgrove, et al., 153 Ga. App. 690, 266 S.E.2d 228 (1980) (court interpreted OCGA §33-34-4(c) as limiting recovery to "the highest amount of additional PIP purchased on any one policy;" id. at 692).[3] Not even where two premiums have been paid can an insured recover more than the "highest

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[3] The Plaintiff attempts to distinguish Musgrove by pointing out that the policies at issue in Musgrove and the one at issue in the instant case contain different contractual provisions. This Court need not decide whether the contract language in the Continental policy places a limitation on stacking because the Georgia Court of Appeals in Waters found that both the State Farm policy and the Georgia no-fault law prevents "stacking" of benefits. Thus, two independent bases exist for finding that insureds cannot stack PIP benefits.

amount of additional PIP purchased on any one policy." Id.

The Court therefore holds that the Plaintiff, having already recovered $43,750 from Aetna, can recover up to a total of $50,000 optional PIP. That is, he can recover $6,250 from the Defendants, provided he files a proper proof of loss and pays the additional premium.

According to the Defendant, it has received no proof of loss, application for payment of PIP benefits, or additional premium. In contrast, the Plaintiff states that on April 26, 1982, he provided Continental Insurance Company with copies of all his medical bills, which amounted to $92,419.16 at that

time, and that he has paid the amount of $112 as additional premiums due on the two Continental Insurance policies. See Affidavit of Joseph Alton Bowers.

The Court DIRECTS the parties to confer and determine what problem, if any, exists which would prevent the Defendant from now paying the additional PIP benefits in the amount of $6,250 to the Plaintiff. The parties are DIRECTED to submit a status report within 30 days of entry of this Order.

The Court will DEFER ruling on the Plaintiff's request for bad faith penalties, punitive damages and attorney's fees until that time.

Conclusion

The Court DENIES the Plaintiff's Motion for Summary Judgment.

The Court GRANTS the Defendant's Motion for a declaratory relief in part. That is, the Court declares that the Defendant's indebtedness to the Plaintiff as a result of the August 24, 1981 accident cannot as a matter of law exceed $6,250. The Court, however, DEFERS ruling on the Defendant's request that the Court enter an order that the Plaintiff's request for a 25% statutory penalty, attorney's fees, and punitive damages are without merit.

The Court DENIES the Plaintiff's Request for Oral Argument on Defendant's Motion for Declaratory Judgment.

The parties are DIRECTED to submit a status report within 30 days of entry of this Order.

The Clerk is DIRECTED to resubmit this case at that time.

SO ORDERED, this 29 day of September, 1983.

Orinda D. Evans

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX "G"

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. C82-1820

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

ORDER

This Jones-related suit is before the court on the Defendant's motion for dismissal of Plaintiff's notice of appeal and the parties' joint motion for extension to file pretrial order.

On October 4, 1983, the court denied the Plaintiff's Motion for Summary Judgment. The court also granted, in part, the Defendant's motion for declaratory relief. Specifically, the court ruled

that the Defendant's indebtedness to the Plaintiff as a result of the August 24, 1981 accident cannot as a matter of law exceed $6,250.[1] The parties were directed to submit a status report within thirty (30) days of entry of the October 4, 1983 Order.

On October 31, 1983, the parties filed a joint status report in which they stipulated that (1) the Plaintiff tendered the necessary premium for optional PIP coverage in the amount of $45,000 under each of the two policies issued to the Plaintiff by the Defendant and (2) the Defendant submitted to the Plaintiff's

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[1] The court, in reaching this decision, concluded that the Plaintiff could not "stack" benefits on his insurance policies.

attorney additional PIP benefits in the amount of $6,250. The parties also stipulated that

> acceptance and negotiation of the aforesaid $6,250 by plaintiff will not be construed as a waiver of any additional benefits or rights to PIP benefits under the policies issued by defendant, including the recovery of a statutory penalty, attorney's fees or punitive damages which plaintiff may claim remain under the policies issued by defendant for the accident of August 24, 1981. By this document defendant is not admitting that it is indebted to plaintiff for PIP benefits in any amount above the sum of $6,250 paid by defendant to plaintiff, but rather, the parties agree and stipulate that this litigation shall continue over those issues which remain in dispute. The payment of $6,250 in PIP benefits has been made to plaintiff by defendant because no dispute exists between the parties as to that portion of plaintiff's claim.

The Plaintiff filed a notice of appeal from the October 4, 1983 Order. The Defendant now moves the court to dismiss the notice of appeal because the October 4 order was not final and is therefore not appealable.

The court agrees the (sic) the October 4 Order was not a final decision. For a decision to be final it must be one which "ends the litigation on the merits and comprehends only execution of the court's decree." Dunlop v. Ledet's Foodliner of Larose, Inc., 509 F.2d 1387,

1389 (5th Cir. 1975).[2] The denial of the Plaintiff's motion for summary judgment was not a final decision and is therefore non-appealable. See In re Yarn Processing Patent Validity Litigation, 541 F.2d 1127, 1138 (5th Cir. 1976), cert. denied, 433 U.S. 910 (1977). The granting, in part, of Defendant's motion for declaratory relief was also not a final decision because the issue of whether the Plaintiff is entitled to statutory penalties, punitive damages, and attorney's fees was reversed. Cf. National Corn Growers Association, Inc. v. Bergland, 611 F.2d 730, 733 (8th Cir.

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[2] Decisions of the Fifth Circuit handed down prior to September 30, 1981 are binding precedent unless overruled or modified by the Eleventh Circuit en banc. Bonner v. City of Prichard, 661 F.2d 1206, 1209-10 (11th Cir. 1981).

1980) (per curiam) (declaration of rights not an appealable order, in absence of permissive interlocutory appeal under §1292(b), when claims to injunctive relief or damages remain); Beare v. Briscoe, 498 F.2d 244 244-45 n.1 (5th Cir. 1974) (per curiam) (no appealable order in absence of permissive interlocutory appeal under §1292(b) when declaratory judgment did not take care of whole case).

The timely filing of a notice of appeal ordinarily divests the district court of jurisdiction with respect to any matters involved in the appeal. See Taylor v. Sterrett, 640 F.2d 663, 667 (5th Cir. 1981). However, when the notice of appeal is deficient because it

refers to a non-appealable order, the majority of courts, including this circuit, hold that the district court may disregard the notice and proceed with the case. See United States v. Hitchmon, 602 F.2d 689 (5th Cir. 1979) (en banc); accord Cochran v. Birkel, 651 F.2d 1219 (6th Cir.), cert. denied, 454 U.S. 1152 (1981); Arthur Anderson & Company v. Finesilver, et al., 546 F.2d 338 (10th Cir. 1976), cert. denied, 429 U.S. 1096 (1977); Hodgson v. Mahoney, 460 F.2d 326 (1st Cir. 1972) (per curiam), cert. denied, 409 U.S. 1039 (1973); Ruby v. Secretary of United States Navy, 365 F.2d 385 (9th Cir. 1966) (en banc), cert. denied, 386 U.S. 1011 (1967); 9 Moore's Federal Practice ¶203.11 at 3-51,-52

(1983). According to some courts, the notice of appeal is then deemed to be a nullity. E.g., Century Laminating, Ltd. v. Montgmery, 595 F.2d 563 (10th Cir.), cert. granted, 444 U.S. 897, cert. dismissed, 444 U.S. 987 (1979). Thus, the Plaintiff's filing of a notice of appeal did not divest the court of jurisdiction in the instant case. The court is therefore now able to address the unresolved issue of whether the Plaintiff is entitled to statutory penalties, punitive damages, and attorney's fees.

The relevant statutory provisions provide:

* * *

(b) Benefits required to be paid without regard to fault shall be payable monthly as loss accrues. The benefits are overdue if not paid within 30 days after the insurer received reasonable proof of the fact and the amount of loss sustained. If reasonable proof of loss is not supplied as to the entire claim, the amount supported by reasonable proof is overdue if not paid within 30 days after proof is received by the insurer. Any part or all of the remainder of the claim that is later supported by reasonable proof is overdue if not paid within 30 days after proof is received by the insurer. For the purpose of calculating the extent to which any benefits are overdue, payment shall be treated as made on the date a draft or other valid instrument was placed in the United States mail or to the last known address in a properly addressed, postpaid envelope, or if not so posted, on the date of delivery.... In the event the insurer fails to pay each benefit when due, the person entitled to the benefits

> may bring an action to recover them and the insurer must show that its failure or refusal to pay was in good faith, otherwise the insurer shall be liable for a penalty not exceeding 25 percent of the amount due and reasonable attorneys fees.
>
> (c) In addition..., in the event that an insurer fails or refuses to pay a person the benefits which the person is entitled to...within 60 days after proper proof of loss has been filed, the person may bring an action to recover the benefits; and, if the insurer fails to prove that its failure or refusal to pay the benefits was in good faith, the insurer shall be subject to punitive damages.

O.C.G.A. §33-34-b(b),(c). The test under this statutory provision is one of good faith of the insurer; the burden of proving such good faith is on the insurer. Bituminous Casualty Corporation

v. Mowery, 145 Ga. App. 45, 244 S.E.2d 573 (1978).

There is no bad faith where a doubtful question of law is involved. Brown v. Seaboard Lumber and Supply Company, 221 Ga. 35, 142 S.E.2d 842 (1965). "Bad faith" on the part of an insurance company is a "frivolous and unfounded denial of liability." State Farm Mutual Automobile Insurance Company v. Harper, 125 Ga. App. 696, 188 S.E.2d 813 (1972). In other words, an insurance company is not acting in bad faith if there is any reasonable ground for contesting liability. American Casualty Company v. Ten Tex Corporation, 357 F.2d 269, 271 (5th Cir. 1958). If the insurer's defense or reason for not

paying the benefits demonstrates a "reasonable and probable cause" for refusing payment, then this defense legally vindicates the good faith of the company. Mowery, 145 Ga. App. at 45, 244 S.E.2d at 573.

Until recently, Continental Insurance Company apparently believed that the Plaintiff received $50,000 in PIP benefits under the Aetna Insurance Company policy. Because the Defendant believed that the Plaintiff had recovered "the full amount authorized by law," see Defendant's Response to Order at 3, it concluded that it need not extend optional PIP coverage. The court hereby holds that the Defendant's failure to

extend the optional PIP coverage and pay the PIP benefits was in good faith.[3] The Plaintiff is therefore not entitled to the statutory penalties, punitive damages, and attorney's fees. Having so concluded, the court GRANTS the Defendant's Motion for a declaratory judgment that the Plaintiff's request for statutory penalties, punitive damages, and attorney's fees are without merit.

The Clerk is DIRECTED to enter final judgment in favor of the Defendant.

The Defendant's Motion for dismissal of Plaintiff's notice of appeal is

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[3] Although the issue of good or bad faith of the insurer is ordinarily for the jury, there are instances in which the issue is one of law for the court. See, e.g., Government Employees Insurance Company v. Mooney, No. 39193 (Ga. Sup. Ct. March 16, 1983).

DISMISSED as moot. The joint motion for extension to file pretrial order is DISMISSED as moot.

SO ORDERED, this 11 day of January, 1984.

Orinda D. Evans

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

APPENDIX "H"

JUDGMENT ON DECISION BY THE COURT

FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA - ATLANTA DIVISION

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

Civil Action Docket No. C82-1820A

JUDGMENT

This action came on for consideration before the court, United States District Judge Orinda D. Evans presiding. The issues having been duly considered and a decision having been duly rendered, it is ordered and adjudged that the plaintiff take nothing, that the action be dismissed, and that the defendant THE

CONTINENTAL INSURANCE COMPANY recover of the plaintiff JOSEPH ALTON BOWERS its costs of action.

FILED & ENTERED IN CLERK'S OFFICE THIS
13TH DAY OF JANUARY, 1984
BEN H. CARTER, CLERK

By: Mary J. Watson
Deputy Clerk

Dated at: Atlanta, Georgia
Date: January 13, 1984

BEN H. CARTER, CLERK

By: Mary J. Watson
Deputy Clerk

APPENDIX "I"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Docket No. C82-1820A

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

NOTICE OF APPEAL

Notice is hereby given that Joseph Alton Bowers, plaintiff in the above-styled case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order of the United States District Court for the Northern District of Georgia, Atlanta Division, entered October 4, 1983, which Order

denied plaintiff's Motion for Summary Judgment and granted defendant's Motion for Declaratory Relief. The Clerk will omit nothing from the record on appeal.

This 1 day of November, 1983.

ZUSMANN, SMALL, STAMPS & WHITE

By: Ronald A. Lowry
Ronald Arthur Lowry
Attorney for Plaintiff,
Joseph Alton Bowrs

ZUSMANN, SMALL, STAMPS & WHITE
2964 Peachtree Road N.W.
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Atlanta, Georgia 30305

APPENDIX "J"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action Docket No. C82-1820A

JOSEPH ALTON BOWERS

vs.

THE CONTINENTAL INSURANCE COMPANY

NOTICE OF APPEAL

Notice is hereby given that JOSEPH ALTON BOWERS, plaintiff in the above-styled case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order of the United States District Court for the Northern District of Georgia, Atlanta Division, entered January 13, 19834 which Order

granted Defendant's Motion to Strike Plaintiff's Request for Statutory Penalties, Punitive Damages, and Attorney's Fees and entered final judgment in favor of the Defendant. The Clerk will omit nothing from the record on appeal.

Notice is further given of a related appeal in the above referenced case, filed November 1, 1983, being U.S.C.A. No. 83-8787.

This 24th day of January, 1984.

ZUSMANN, SMALL, STAMPS & WHITE
A Professional Corporation
Attorney for Plaintiff

By: Ronald A. Lowry
Ronald Arthur Lowry

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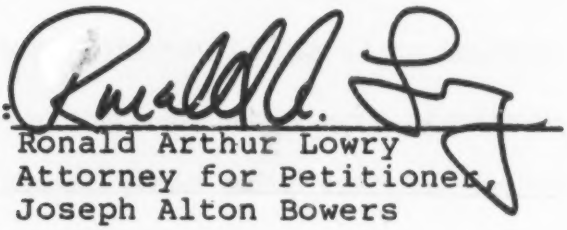
Atlanta, Georgia 303[illegible]
(404) 237-0071

STATEMENT

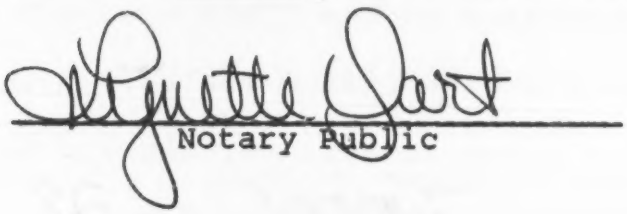
Pursuant to Rule 28.2 of the Rules of the Supreme Court, this statement certifies that the original and forty copies of a Supplemental Appendix to Petition for Writ of Certiorari in the above styled case were deposited in a United States post office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States. This mailing took place in Atlanta, Georgia on the afternoon of TUESDAY, May 28, 1985, within the time permitted by the

Rules of the Supreme Court for the filing of a Petition for a Writ of Certiorari in this case.

Respectfully submitted,

By: 
Ronald Arthur Lowry
Attorney for Petitioner,
Joseph Alton Bowers

Sworn to and subscribed before
me this 28th day of May, 1985.


Notary Public

Notary Public, Georgia, State at Large
My Commission Expires June 3, 1986

CERTIFICATE OF SERVICE

This is to certify that I have this date served three copies of the foregoing SUPPLEMENTAL APPENDIX upon the United States Court of Appeals for the Eleventh Circuit, 50 Spring Street, S.W., Atlanta, Georgia 30303-3147, and upon William S. Sutton, attorney for Appellee, Continental Insurance Company, McClain & Merritt, P.C., 1250 Tower Place, Atlanta, Georgia 30026-3901 by depositing same in

the United States Mail in a properly addressed envelope with adequate postage thereon.

This 28 day of May, 1985.

By: Ronald Arthur Lowry
Attorney for Petitioner,
Joseph Alton Bowers

Sworn to and subscribed before me this 28th day of May, 1985.

Notary Public

Notary Public, Georgia, State at Large
My Commission Expires June 3, 1986